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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

FARID TARIG ZADRAN,

Defendant and Appellant.

C086109

(Super. Ct. No. 13F07741)

Defendant Farid Tarig Zadran enlisted the help of various individuals to fraudulently buy cell phones from Sam's Club, obtaining a substantial discount on the price of the phones by signing up for service contracts using other people's identifying information without their knowledge or consent; when the victims of the identity theft canceled the service contracts entered into using their identities, the service providers charged Sam's Club the difference between the retail value of the phones and the

discounted price obtained at the time of the fraudulent purchases, resulting in a substantial loss to the company.

Defendant was tried by jury and convicted of 17 counts of identity theft, 16 counts of grand theft, and two counts of petty theft. The trial court sentenced defendant to serve an aggregate split sentence of 10 years, 4 years to be served in the county jail and 6 years to be served on mandatory supervision, and imposed other orders.

On appeal, defendant contends: (1) all but one of his theft convictions must be reversed because multiple takings from a single victim, i.e., Sam's Club, were committed pursuant to a single scheme; (2) the trial court acted outside the authority conferred by Penal Code¹ section 1202.4 and violated defendant's constitutional right to due process by calculating victim restitution based on both charged and uncharged takings; and (3) four conditions of mandatory supervision must be stricken because they suffer from various constitutional defects.

We conclude the multiple takings doctrine in existence when defendant committed the thefts in this case permitted conviction on only one count of grand theft rather than the sixteen convictions for grand theft and the two convictions for petty theft based on the same scheme and involving the same victim. We must therefore reverse 15 of defendant's grand theft convictions and both of his petty theft convictions. We also conclude section 1202.4 does not support the portion of the victim restitution order attributable to fraudulent takings occurring outside the time period charged in the information. That portion of the order must be stricken. With respect to the challenged supervision conditions, one must be modified and two must be stricken. In all other respects, we shall affirm the judgment.

¹ Undesignated statutory references are to the Penal Code.

FACTS

The evidence adduced in this case included purchase receipts and service contracts for 60 individual fraudulent transactions. However, as indicated, the specific charges against defendant involved only 18 of those transactions, 17 of which were entered into using another person's identifying information without their knowledge or consent. We limit our recitation of relevant facts to the transactions underlying the counts of conviction.

Defendant's scheme to steal from Sam's Club involved the assistance of various accomplices. One of defendant's accomplices, K., was the team leader of the store's electronics department. As she explained the store's procedure for selling cell phones, a customer who signed up for a service contract with a service provider, such as AT&T or Verizon, would receive a substantial discount on the price of the phone. In order to buy a phone from Sam's Club, the customer needed a membership card. In addition to the membership card, in order to sign up for a contract with one of the service providers, the customer also needed a photo identification. The employee assisting the customer with the purchase was required to make sure the photo on the identification matched the person signing up for the contract. After the contract was approved by the service provider and signed by the customer, the customer would provide his or her Sam's Club membership card to complete the purchase of the phone at the heavily discounted rate. At this point in the transaction, the employee was supposed to make sure the person buying the cell phone was the same person whose name and photo appeared on both the membership card and the photo identification. Defendant paid K. to look the other way when someone he sent into the store to buy cell phones used another person's membership card and/or photo identification.

Although the overall larcenous scheme was carried out over the span of about a year, the charges against defendant involved transactions occurring from December 2012 to April 2013. During this period, defendant sent several people into Sam's Club to buy

cell phones on his behalf. One of these people, M., used his own identifying information to sign up for service contracts in order to buy the phones at the discounted rate. He bought cell phones for defendant on one occasion. Defendant offered him \$100 a phone to buy new iPhones from Sam's Club using defendant's membership card. M. agreed. Defendant drove M. to the store and gave him enough money to cover the discounted purchase price. Inside the store, M. was able to purchase three cell phones, again using his own name and photo identification to enter into the service contract necessary to obtain the discounted purchase price of \$97 for each phone. After completing the transaction, M. returned to the parking lot, gave defendant the cell phones, and received the agreed-upon \$300 for making the purchase. Defendant then sold the phones to an unidentified buyer for a profit. When M. later defaulted on the service contract he entered into in order to obtain the discounted purchase price, the service provider charged Sam's Club the difference between the retail value of the phones and the discounted price obtained at the time of the purchase, \$525 per phone, for a total loss to Sam's Club of \$1,575. Based on this transaction, defendant was convicted of one count of grand theft (count thirty-five).

The remaining theft counts (even-numbered counts from count two through count thirty-four) were each accompanied by a count of identity theft (odd-numbered counts from count one through count thirty-three) because these thefts, while otherwise taking the form of the theft described above, were carried out by using another person's identifying information, without the person's knowledge or consent, to enter into the requisite service contract. One of these fraudulent transactions was carried out by defendant himself, using his own Sam's Club membership card and another person's identifying information.

The other fraudulent purchases forming the basis of defendant's remaining convictions were made with the help of multiple accomplices. One of these accomplices, P., admitted to engaging in three such transactions on defendant's behalf. Defendant

used P.'s photo identification to create fake identification cards with P.'s photo and other people's identifying information; he also paid for P. to obtain her own Sam's Club membership card. As with M., each time defendant drove P. to the store to make a purchase, he gave her enough money to cover the discounted purchase price for the number of phones she was sent in to buy. Unlike M., P. used her own membership card and one of the fake identification cards to enter into the service contract necessary to obtain the discounted purchase price. After completing each transaction, P. would return to defendant in the parking lot, give him the cell phones, and receive \$100 per phone for making the purchase. At some point, P. decided to stop buying cell phones for defendant, returned the fake identification cards, and gave her Sam's Club membership card to another female at defendant's direction. The remaining fraudulent transactions were apparently carried out by an unidentified accomplice using either defendant's or P.'s membership card and another person's identifying information.

Each identity theft victim testified that he or she did not make the purchase in question and did not give anyone else permission to do so. As with the purchase made by M., after each of these fraudulent purchases, defendant would sell the phones to an unidentified buyer for a profit. Because these purchases were made using other people's identifying information to enter into unauthorized service contracts, the unsuspecting victims of identity theft eventually received a bill in the mail. When they reported the fraud and canceled the contracts, the service providers charged Sam's Club the difference between the retail value of the phones and the discounted price obtained at the time of the purchase.

The total loss to Sam's Club attributable to the fraudulent transactions forming the basis of defendant's convictions was \$23,955.

DISCUSSION

I

Multiple Takings Doctrine

Defendant contends we must reverse all but one of his theft convictions because multiple takings from a single victim were committed pursuant to a single scheme. The Attorney General concedes the issue. We accept the concession.

In *People v. Whitmer* (2014) 59 Cal.4th 733 (*Whitmer*), our Supreme Court held that “a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme.” (*Id.* at p. 741.) There, the defendant, manager of a motorcycle dealership, engaged in a scheme to steal from the dealership by arranging for the fraudulent sale of 20 motorcycles and other vehicles, carrying out separate transactions for each vehicle on 13 separate dates. (*Id.* at p. 735.) At the time the defendant carried out his larcenous scheme, a “long, uninterrupted series of Court of Appeal cases . . . [had] consistently held that multiple acts of grand theft pursuant to a single scheme cannot support more than one count of grand theft.” (*Id.* at p. 742.) These decisions were based on an erroneous reading of a prior Supreme Court decision, *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*). As the *Whitmer* court explained, *Bailey* did not involve “a series of separate and distinct, although similar, fraudulent acts,” but rather “concerned a single fraudulent act followed by a series of payments.” (*Whitmer*, at p. 740.) Moreover, *Bailey* distinguished, but did not overrule, prior Supreme Court decisions upholding multiple theft convictions based on separate and distinct transactions conducted pursuant to a single scheme. (*Whitmer*, at pp. 737-739; see, e.g., *People v. Stanford* (1940) 16 Cal.2d 247.) Nevertheless, “given the numerous, and uncontradicted, Court of Appeal decisions over a long period of time” interpreting *Bailey* to prohibit multiple theft convictions in these circumstances, the *Whitmer* court concluded its contrary holding disapproving of such an interpretation amounted to “an unforeseeable judicial enlargement of criminal

liability for multiple grand thefts” that could not be applied to the defendant’s case without violating his or her right to due process. (*Whitmer*, at p. 742.)

The same reasoning applies here. As in *Whitmer*, defendant committed a series of separate and distinct fraudulent acts pursuant to an overarching scheme to steal from Sam’s Club. “Each fraudulent act was accompanied by a new and separate intent to commit that fraud.” (*Whitmer*, *supra*, 59 Cal.4th at p. 740.) However, also like *Whitmer*, because defendant committed these fraudulent acts before *Whitmer* was decided, at a time when numerous Court of Appeal decisions held *Bailey*, *supra*, 55 Cal.2d 514 bars multiple theft convictions where multiple takings from a single victim are committed pursuant to a single scheme (see, e.g., *People v. Kronemyer* (1987) 189 Cal.App.3d 314; *People v. Brooks* (1985) 166 Cal.App.3d 24; *People v. Packard* (1982) 131 Cal.App.3d 622), we may not apply the *Whitmer* holding in defendant’s case.

We shall reverse all but one of defendant’s grand theft convictions and we shall also reverse both of defendant’s petty theft convictions.

II

Victim Restitution

Defendant also claims the trial court acted outside the authority conferred by section 1202.4 and violated his constitutional right to due process by calculating victim restitution based on both charged and uncharged takings. We need not address the constitutional issue because we conclude section 1202.4 does not support the portion of the victim restitution order attributable to fraudulent takings occurring outside the time period charged in the information. That portion of the order must therefore be stricken.

A.

Forfeiture

As a preliminary matter, the Attorney General argues this claim is forfeited because defendant did not object to the restitution order below on the ground he now asserts on appeal. We disagree. A defendant’s failure to object to a restitution order

“forfeit[s] any claim that the order [is] . . . unwarranted by the evidence, as distinct from being unauthorized by statute.” (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) As we explain immediately below, the portion of the restitution order defendant challenges in this appeal is not authorized by section 1202.4. This error is “correctable without referring to factual findings in the record or remanding for further findings,” and is therefore reviewable despite defendant’s failure to object on this ground below. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

B.

Analysis

As previously mentioned, based on the method of calculating the total loss to Sam’s Club utilized by the trial court, the loss attributable to the fraudulent transactions *forming the basis of defendant’s convictions* was \$23,955, occurring over the span of about four months. However, as also indicated, the evidence adduced at trial included purchase receipts and service contracts for 60 individual fraudulent transactions, occurring over the span of about a year. The trial court ordered restitution based on all of these transactions, resulting in the challenged victim restitution order in the amount of \$76,724.50.

“We review the trial court’s restitution order for abuse of discretion. [Citation.] A restitution order that is based on a demonstrable error of law constitutes an abuse of the trial court’s discretion. [Citation.]” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1048-1049.)

“The scope of the trial court’s authority with respect to victim restitution depends on whether the restitution is ordered pursuant to section 1202.4 or as a condition of probation pursuant to section 1203.1. ‘[U]nder section 1203.1, “California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction.” ’ [Citation.] In contrast, section 1202.4 provides:

‘It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant *convicted of that crime.*’ (§ 1202.4, subd. (a)(1), italics added.) Accordingly, ‘when a court imposes a prison sentence following trial, section 1202.4 limits the scope of victim restitution to losses caused by the criminal conduct for which the defendant sustained the conviction.’ [Citation.]” (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 190 (*Rahbari*).)

In *Rahbari*, our colleagues at the First Appellate District held, “victim restitution ordered as part of a sentence to county jail followed by mandatory supervision . . . is an order pursuant to section 1202.4 and its scope is limited ‘to those losses arising out of the criminal activity that formed the basis of the conviction.’ [Citation.]” (*Rahbari, supra*, 232 Cal.App.4th at p. 196.) In so concluding, the court first looked to the language of section 1170, subdivision (h), providing for mandatory supervision, and noted the many distinctions between mandatory supervision and probation have caused both courts and commentators to conclude “ ‘the Legislature has decided a county jail commitment followed by mandatory supervision . . . is akin to a state prison commitment; it is not a grant of probation or a conditional sentence.’ ” (*Rahbari*, at pp. 191-192, quoting *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.) The court also reviewed the legislative history and concluded it supported such a view. (*Rahbari*, at pp. 192-194.) Finally, the court explained “the rationale behind the rule authorizing broader victim restitution for probation sentences,” i.e., “ “ ‘that the granting of probation is not a right but a privilege, and that if the defendant feels that the terms of probation are harsher than the sentence for the substantive offense he [or she] is free to refuse probation,’ ” ’ ” did not support extending that rule to the context of ordering victim restitution when a defendant’s sentence includes mandatory supervision because “a defendant has no right to refuse a sentence including mandatory supervision.” (*Id.* at pp. 194-195.)

We agree with the *Rahbari* court’s assessment of the issue. “[T]he broad scope of victim restitution which can be imposed by the trial court as a condition of probation cannot be imposed as a condition of mandatory supervision.” (*Rahbari, supra*, 232 Cal.App.4th at p. 195.) Instead, section 1202.4 limits the trial court’s authority to impose victim restitution in this case “to losses caused by the criminal conduct for which the defendant was convicted.” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1246 (*Lai*).)

In *Lai*, the defendants were convicted of welfare fraud between January 1985 and February 2000. However, the trial court imposed a victim restitution order that included reimbursement for “fraudulently obtained aid shown by prosecution evidence at trial, but occurring from September 1980 to March 1983, before the crimes of which [the defendants] were convicted.” (*Lai, supra*, 138 Cal.App.4th at p. 1246, italics omitted.) Citing the foregoing rule, the Court of Appeal concluded section 1202.4 did not authorize “that portion of the restitution order . . . attributable to fraudulently obtained aid before the charged period.” (*Lai*, at p. 1249.)

Similarly, here, defendant was convicted of 16 grand theft offenses and two petty theft offenses committed between December 2012 and April 2013 pursuant to one overarching fraudulent scheme to steal from Sam’s Club. However, although the amount of loss attributable to these offenses was \$23,955, the trial court’s restitution order of \$76,724.50 included losses attributable to thefts occurring outside the charged time period. Accordingly, the portion of the restitution order not based on defendant’s actual theft convictions (\$52,769.50) was not authorized by section 1202.4 and must be stricken from the restitution order.

III

Mandatory Supervision Conditions

Finally, defendant asserts four conditions of mandatory supervision must be stricken because they suffer from various constitutional defects. We address each of the

challenged conditions in turn and conclude one must be modified and two must be stricken.

A.

Scope of Review

We review the trial court's imposition of conditions of mandatory supervision for abuse of discretion, analyzing "the validity of the terms of supervised release under standards 'parallel to those applied to terms of parole.' [Citation.]" (*People v. Malago* (2017) 8 Cal.App.5th 1301, 1306.) " 'The fundamental goals of parole are " 'to help individuals reintegrate into society as constructive individuals' [citation], " 'to end criminal careers through the rehabilitation of those convicted of crime" ' [citation] and to [help them] become self-supporting." ' [Citation.] To further these goals, '[t]he state may impose any condition reasonably related to parole supervision.' [Citation.]" (*Ibid.*) Moreover, " '[t]he validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions.' [Citation.]" (*Ibid.*)

However, a defendant who does not challenge the reasonableness of a probation condition in the trial court forfeits the ability to do so on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*); *People v. Welch* (1993) 5 Cal.4th 228, 234-238.) Recognizing he did not object below to the conditions he now challenges in this appeal, defendant does not claim the conditions are unreasonable. Instead, he raises only facial constitutional challenges to the conditions. He may do so. (*Sheena K.*, at pp. 884-889.)

B.

Seek and Obtain Counseling

The first challenged condition states: "Defendant seek and obtain professional counseling and/or treatment through and under the direction of the probation officer." Defendant argues this condition is unconstitutionally vague and overbroad and also amounts to an improper delegation of the trial court's power to set the terms and conditions of mandatory supervision by granting the probation officer charged with

defendant's mandatory supervision "unfettered discretion to order [him] to . . . participate in any counseling or treatment." We agree with the latter assertion and decline to address vagueness or overbreadth.

"It is well settled that courts may not delegate the exercise of their discretion to probation officers." (*In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1372.) For example, in *People v. Cervantes* (1984) 154 Cal.App.3d 353, the trial court ordered the defendant to pay restitution "in an amount and manner to be determined by the probation officer." (*Id.* at p. 355.) On appeal, the court held the trial court improperly delegated "unlimited discretion to a probation officer to determine the propriety, amount, and manner of payment of restitution," noting, "these determinations are essentially judicial functions." (*Id.* at p. 358.) Similarly, in *People v. O'Neil* (2008) 165 Cal.App.4th 1351, the trial court ordered the defendant, who was convicted of possession of narcotics for sale, to refrain from "associating with persons designated by his probation officer." (*Id.* at p. 1354.) The Court of Appeal held this also amounted to an improper delegation of "unlimited" discretion to the probation officer because the condition "did not in any way define the class of persons who could be so designated." (*Id.* at p. 1358.) The court continued: "While the [trial] court may well have anticipated that the probation officer would specify individuals known to be using or dealing in illicit drugs, . . . 'this factor should not be left to implication.' [Citations.]" (*Ibid.*)

Here too, the challenged condition of mandatory supervision orders defendant to "seek and obtain professional counseling and/or treatment," but does not define the type of counseling or treatment defendant is to obtain, instead giving the probation officer unlimited discretion to select not only the specific treatment program (see *People v. Penoli* (1996) 46 Cal.App.4th 298, 308 [delegation of authority to probation officer to select specific drug rehabilitation program upheld because "trial court is poorly equipped to micromanage selection of a program"]), but also the type of counseling or treatment defendant is to receive. In *People v. Brooks* (2017) 15 Cal.App.5th 331 (*Brooks*), our

colleagues at the Fourth Appellate District held a nearly identical probation condition improperly delegated judicial decisionmaking to the probation officer. (*Id.* at p. 333.) Although the court’s reasoning is contained in an unpublished portion of the opinion, we reach the same conclusion based on the authorities set forth above.

Turning to the appropriate remedy, the *Brooks* court modified the condition to specify the type of treatment the defendant in that case was to receive, i.e., “ ‘a drug and alcohol counseling/educational program.’ ” (*Brooks, supra*, 15 Cal.App.5th at p. 337.) Defendant does not object to this court doing the same. However, here, defendant’s convictions are not drug-related but rather theft-related. We shall therefore modify the challenged condition to state: “Defendant shall participate in a theft-related counseling/educational program as directed by the probation officer and not terminate said participation without the mutual consent of the probation officer and the program director.”

C.

Follow Reasonable Instructions

Defendant makes the same argument with respect to the second challenged condition. This condition states: “You are to follow in all respects any reasonable instructions given to you by the probation officer having your supervision.” We are not persuaded.

A probation condition to “ ‘[f]ollow such course of conduct as the probation officer may prescribe’ ” was upheld in *People v. Kwizera* (2000) 78 Cal.App.4th 1238. (*Id.* at p. 1240.) The court explained: “[T]he [trial] court has the power and responsibility to impose conditions such as drug testing or reporting to the probation department. In order to supervise compliance with these conditions, the probation department must have authority to set the time and place for administration of the drug test or when the defendant is to report to the department. The phrase ‘follow such course of conduct as the probation officer prescribes,’ . . . is reasonable and necessary to enable

the department to supervise compliance with the specific conditions of probation. It does no more. Since the court does not have the power to impose unreasonable probation conditions, it could not give that authority to the probation officer through [the challenged condition].” (*Ibid.*)

The same is true of the condition challenged in this case. Far from improperly delegating authority to impose conditions of mandatory supervision to the probation officer, the condition instead gives the probation officer tools to supervise compliance with the specific conditions properly imposed by the trial court. Defendant’s contention to the contrary is without merit.

Nor are we persuaded the condition is unconstitutionally vague or overbroad. As our Supreme Court has explained, “the underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).’ [Citation.]” (*Sheena K., supra*, 40 Cal.4th at p. 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required . . . and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Ibid.*) Moreover, “[a] probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Ibid.*)

Here, there is nothing vague about the challenged condition. It directs defendant to follow any reasonable instructions given by the probation officer, i.e., all instructions reasonably necessary to enable the probation officer to supervise compliance with the specific conditions imposed by the trial court. Nor is the condition unconstitutionally overbroad. Indeed, only probation conditions that interfere with a person’s constitutional

rights are subject to close scrutiny as to narrow tailoring. (*People v. Olguin* (2008) 45 Cal.4th 375, 384 [declining to “apply such close scrutiny in the absence of a showing that the probation condition infringes upon a constitutional right”].) Defendant cites us to no authority supporting the position that a condition requiring compliance with reasonable instructions from the probation officer infringes upon any of defendant’s constitutional rights.

D.

Electronics Search Conditions

The third and fourth challenged conditions provide: “Defendant shall disclose all e-mail accounts, all Internet accounts, and any other means of access to any computer or computer network, all passwords and access codes. Defendant shall consent to the search of such e-mail and Internet accounts at any time and the seizure of any information or data contained therein without a search warrant or probable cause; [¶] . . . [¶] . . . Defendant shall submit his/her person, place, property, automobile, electronic storage devices, and any object under his/her control, including but not limited to cell phones and computers, to search and seizure by any law enforcement officer or probation officer, any time of the day or night, with or without a warrant, with or without his/her presence or further consent. [¶] Defendant being advised of his/her constitutional and statutory rights pursuant to . . . section 1546 et seq. in this regard, and having accepted probation, is deemed to have waived same and also specifically consented to search of his/her electronic storage devices. [¶] Defendant shall provide access to any electronic storage devices and data contained therein, including disclosing and providing any and all information necessary to conduct a search.”

Defendant argues the portions of these conditions authorizing warrantless electronics searches are unconstitutionally overbroad. We need not address the constitutional challenge because we conclude our Supreme Court’s recent decision in *In re Ricardo P.* (2019) 7 Cal.5th 1113, 1122 (*Ricardo P.*) requires us to strike the

electronics search portions of the challenged conditions, hereafter simply referred to as the electronics search conditions.²

“A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486, italics omitted (*Lent*)). The *Lent* “test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]” (*People v. Olguin, supra*, 45 Cal.4th at pp. 379-380.)

In *Ricardo P.*, the minor defendant was granted probation after admitting two counts of felony burglary. As a condition of probation, the court required the defendant to submit to warrantless searches of his electronic devices, including any electronic accounts that could be accessed through those devices. There was no evidence the defendant had used an electronic device in connection with committing the burglaries. Nonetheless, the court imposed the condition to monitor the defendant’s compliance with other probation conditions that prohibited him from using or possessing illegal drugs or associating with people who did. (*Ricardo P., supra*, 7 Cal.5th at pp. 1116-1117.)

² As previously mentioned, defendant did not object to the electronics search conditions below and has therefore generally forfeited the ability to challenge their reasonableness on appeal. (*Sheena K., supra*, 40 Cal.4th at p. 882; *People v. Welch, supra*, 5 Cal.4th at pp. 234-238.) However, because the intervening *Ricardo P.* decision makes it unnecessary for us to resolve defendant’s constitutional challenge, we address the propriety of the electronics search conditions under *Ricardo P.* and conclude they must be stricken.

The Court of Appeal concluded the electronics search condition was not improper under the *Lent* test because, although the first two prongs were satisfied, the condition survived under the third prong. (*Lent, supra*, 15 Cal.3d 486.) Our Supreme Court disagreed, holding the condition was not reasonably related to the minor's future criminality. As the court explained, *Lent* "contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." (*Ricardo P., supra*, 7 Cal.5th at p. 1122.) The condition significantly burdened the minor's privacy interests, given how much sensitive and confidential information can be accessed on devices such as cell phones. (*Id.* at p. 1123.) The only rationale provided by the trial court in support of placing such a significant burden on the minor's privacy was evidence the minor previously used marijuana and its observation that minors often brag about using marijuana or other drugs by posting online pictures of themselves with drugs or paraphernalia. (*Id.* at p. 1122.) Rejecting this rationale, our Supreme Court stated: "If we were to find this record sufficient to sustain the probation condition at issue, it is difficult to conceive of any case in which a comparable condition could not be imposed, especially given the constant and pervasive use of electronic devices and social media by juveniles today. In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." (*Id.* at p. 1123.) Requiring a probationer to surrender electronic devices and passwords to search at any time imposes a heavy burden on a probationer's privacy interests and "requires a correspondingly substantial and particularized justification." (*Id.* at p. 1126.) That justification was absent in *Ricardo P.*

The same reasoning applies in this case. Defendant was convicted of multiple counts of identity theft and, as modified by this opinion, one count of grand theft based on an overarching scheme to steal cell phones from Sam's Club. During the scheme, defendant sent various accomplices into Sam's Club with other people's identifying information and fake identification cards to fraudulently execute cell phone service

contracts on behalf of the unsuspecting victims of identity theft. There is no evidence, however, that he acquired the identifying information or manufactured the identification cards with the assistance of electronic devices, internet access, or social media. Indeed, there is no evidence as to how defendant acquired the information or identification cards. There is also no evidence that defendant has ever used any electronic storage device or social media in connection with criminal conduct. Given the heavy burden an electronics search condition imposes on defendant's privacy interests, the evidence supporting a finding under *Lent*'s third prong must be related directly to the defendant or his crime. Because there is no such evidence in this record, the electronic search conditions are invalid under *Lent, supra*, 15 Cal.3d 481 and *Ricardo P., supra*, 7 Cal.5th 1113 and must be stricken.³

DISPOSITION

Defendant's convictions in counts four, six, eight, ten, twelve, fourteen, sixteen, eighteen, twenty, twenty-two, twenty-four, twenty-six, twenty-eight, thirty, thirty-two, thirty-four, and thirty-five are reversed. The order requiring defendant to make restitution to Sam's Club in the amount of \$76,724.50 is modified to require defendant to make restitution to this victim in the amount of \$23,955. The condition of defendant's mandatory supervision requiring him to seek and obtain counseling is modified to provide: "Defendant shall participate in a theft-related counseling/educational program as directed by the probation officer and not terminate said participation without the mutual consent of the probation officer and the program director." The judgment is further

³ Nothing in this opinion prevents the trial court from exercising its discretion following a noticed hearing to modify the probation terms if presented with additional facts that would tie an electronics search condition to defendant's future criminality as set forth in *Ricardo P.* (See § 1203.3, subds. (a), (b); *People v. Leiva* (2013) 56 Cal.4th 498, 505 [order modifying probation based on the same facts exceeds the court's jurisdiction].)

modified to strike the electronics search conditions set forth in condition Nos. 15 and 22 of defendant's mandatory supervision. As so modified, the judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
MAURO, Acting P. J.

/s/
KRAUSE, J.